



State: Fla.

Appellate Court Says Ratings Firm and Regulators Did Not Violate Sunshine Law: Top [2017-05-10]

An appellate court on Tuesday reversed a trial court ruling that the National Council on Compensation Insurance and Florida regulators violated the state's Sunshine Law when deliberating last year's rate hike.

The 1st District Court of Appeal's panel [decision](#) came down to the definition of the word "committee." The court accepted NCCI's contention that its actuary, Jay Rosen, singlehandedly arrived at the recommended rate increase.

The increase was allowed to go into effect Dec. 1 pending the appeal. More than three-quarters of the increase was due to a Florida Supreme Court decision in April 2016 that the state's statutory fee formula for claimants' attorneys was unconstitutional because it did not allow for reasonable fees in some cases.

Miami claimants' attorney James Fee, a former defense lawyer and an owner of Druckman & Fee, sued NCCI and OIR, contending they violated [Section 627.091](#) of Florida Statutes. That law provides that whenever a committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance meets to discuss rates, it must do so in public under the state's Sunshine Law, [Section 286.011](#) of the Florida Statutes.

"Thus, under the plain and ordinary meaning of the terms 'committee' and 'meet,' Rosen, in his individual capacity, does not act or 'meet' as the statutory rate-determination committee contemplated by section 627.091(6)," Justice Lori S. Rowe wrote for the majority of the appellate panel.

Justices Susan L. Kelsey and Harvey L. Jay III concurred.

The opinion states that the Sunshine Law applies to formal and informal meetings only when two or more members of the same board or commission meet to discuss a matter on which action will be taken later.

"A 'committee' has been defined as a 'subordinate group,' not a single person," Rowe wrote. "The plain language of the statute thus extends sunshine requirements only to rate filings; actions taken by OIR subsequent to receiving a rate filing (approval, disapproval or deviation); and appeals of OIR's actions. The only portion of the statute that has any nexus to NCCI's activities in this case is the rate filing itself."

Until 1991, NCCI's Classification and Rates Committee deliberated on recommended rate filings, but that panel disbanded 26 years ago for all of its state clients nationwide because of antitrust concerns.

NCC provides advisory loss costs for 34 states and the District of Columbia and recommends full rates to regulators in Florida and three other states — Arizona, Idaho and Iowa. In Illinois and Indiana, NCCI provides recommendations for both loss costs and full rates.

Fee could not be reached for comment Tuesday. Maitland claimants' attorney Geoff Bichler said he hopes Fee will appeal the reversal to the state Supreme Court.

"The decision today insulates NCCI from basic transparency that everyone should embrace in the rate-making process," Bichler said. "The rate-making process is a critical component of the workers' compensation system that affects every person in the state of Florida to some degree. When NCCI determines that a court decision requires a rate adjustment, and OIR uses that determination to approve a rate hike, the people have a right to know how that conclusion was reached."

The court decision came one day after the Florida Legislature adjourned its 2017 session and failed to overhaul the workers' compensation system over the business community's concerns of rising costs related to the attorney fee issue.

David Langham, chief deputy judge of the Office of Judges of Compensation Claims, said the 1st DCA ruling was not surprising.

"I thought the characterization of one person as a committee was difficult," Langham said. "If one person is a committee, then any person speaking with someone at the water cooler could be a Sunshine Law violation."

Insurers applauded the ruling and said it was expected.

"It appears that this lawsuit was an attempt to divert attention away from needed workers' compensation reform in Florida," said Trey Gillespie, assistant vice president of workers' compensation for the Property Casualty Insurers Association of America.

"NCCI is a private organization that was not created by a public entity and clearly is not a governmental body subject to the sunshine and public records laws. The evidence was very clear that NCCI did not utilize a rate-determination committee to finalize the filing with OIR," he said.

The American Insurance Association said the trial court ruling, had it stood, would have meant that NCCI could never deliberate out of a public session.

"The Office of Insurance Regulation has always conducted their review of rate filings in a transparent and professional manner, and the opinion of the 1st DCA affirms that as well," said Ron Jackson, AIA Southeast region vice president. "As the DCA's opinion noted, the construction of the law placed upon it by the plaintiff, Mr. Fee, and the circuit court was an overbroad and incorrect application of the terms of the law."

Coral Gables defense attorney H. George Kagan emailed that an appeal to the Supreme Court would be a long shot.

"While it was extremely important to those involved — each of whom having also fought the good fight it certainly seems — and while there was understandable curiosity, even suspicion, about the rate process, its 'Gone with the Wind' news now," Kagan said.

Fee [sued](#) NCCI and OIR on Aug. 10. Leon County Circuit Judge Karen Gievers [ruled](#) Nov. 23 that "clear and convincing evidence" showed that NCCI and OIR held a series of illegal "secret" meetings that resulted in "shutting the public out of meaningful participation in the rate-making process."

NCCI chief legal counsel Steve Sibner said in a telephone interview Tuesday that Florida has one of the most transparent rate-making processes in the country.

"We're obviously pleased with the decision," Sibner said. "I can tell you from my standpoint we always believed we and OIR were in compliance with Florida law.

"OIR has a public hearing each time we submit a filing. In this case, they conducted a public hearing that was four hours long. People had a chance to speak and to submit written comments for a long time afterwards. All of the documents submitted to the OIR were made public. There has been appropriate public scrutiny," he said.

OIR issued only a brief statement: "We're aware of the ruling and pleased by the outcome."

The Florida Justice Reform Institute, a tort reform organization, applauded the appellate court's reversal, saying there was no evidence NCCI used a committee as part of its actuarial analysis.

"NCCI used an actuary, and the actuarial work product was reviewed. Since there wasn't a committee used as part of the actuarial analysis, there was not a public records violation," said William Large, the institute's president.

Florida Workers' Advocates called the ruling disappointing and said it would have a "substantial impact" on Florida businesses and their workers.

"This decision underscores how important it is for the Legislature to stand up to the greedy insurance industry and establish a fair and transparent rate-making process that fosters competition," Mark Touby, FWA's president, said in an emailed statement. "With the next legislative session just eight months away, we look forward to working with the Senate and House to achieve this goal, which is so important to Florida's economic future."

NCCI's original rate filing last summer was for a 19.6% increase, but the ratings firm pared it down to 14.5% after the OIR directed it to do so.

Ultimately a hike of 10.1% was needed, NCCI said, to cover the Supreme Court's ruling in [Castellanos v. Next Door Co.](#) The high court found the attorney fee formula in Section 440.34 of the Florida Statutes unconstitutional as a violation of due process under both the state and U.S. constitutions because it made no allowances to ensure attorney fees would always be reasonable.

The state Supreme Court's decision in [Westphal v. City of St. Petersburg](#) warranted another 2.2% increase, NCCI said. The court found in Westphal that the 104-week statutory limitation on temporary total disability benefits was unconstitutional and should revert to the 260-week limitation in effect before a 1994 law change.

Those two court decisions will cost employers \$1.5 billion in the first year because of higher attorney fees and unfunded liabilities that will occur as claimants' attorneys return to court to get their fees increased for old cases, NCCI says.

The remainder of the 14.5% rate hike was for updates to provider reimbursement manuals.